In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-109

HAL FRANCIS RACHAL AND
EDWARD BARHAM HUNNICUTT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court should have held an evidentiary hearing on their motions alleging that they had been prejudiced by pre-indictment delay.

Following a jury trial in 1971 in the United States District Court for the Western District of Texas, petitioners were convicted of thirteen counts of conspiracy, mail fraud, sale of unregistered securities, and securities fraud, in violation of 15 U.S.C. 77q(a)(2) and 18 U.S.C. 1341 and 371. Petitioner Rachal was sentenced to concurrent terms of five years' imprisonment on all 13 counts, and was fined $10,000 on count 13. Petitioner Hunnicutt was sentenced to concurrent terms of three years' imprisonment on all 13 counts and was fined $5,000 on count 13. On direct appeal the court of appeals affirmed, 473 F. 2d 1338 (C.A. 5), certiorari denied, 412 U.S. 927.

1. In 1973 petitioners filed motions to vacate their convictions, pursuant to 28 U.S.C. 2255, in the United States District Court for the Western District of Texas. They alleged that the Securities and Exchange Commission attorney investigating their cases had decided on December 4, 1968, to recommend prosecution, but had not submitted their cases to the Department of Justice for prosecution until June 1970. The motions contended that as a result of this delay: (1) corporate records became unavailable, and as a result of the unavailability the trial judge gave an unfavorable charge to the jury; and (2) an attorney for the Securities and Exchange Commission, who was to be a material witness in their behalf, died one month prior to trial. The district court denied relief without holding an evidentiary hearing (Pet. App. A-1 to A-3). The court of appeals affirmed without opinion (Pet. App. A-4).

2. The claim that the district court should not have denied petitioners' motions without an evidentiary hearing is insubstantial.

Petitioners' claim that they were prejudiced by preindictment delay because corporate records became unavailable is similar to a contention made on direct appeal. Petitioners previoulsy asserted that the records were not discovered until after trial, and that their eventual discovery was new evidence requiring a new trial. The court of appeals rejected this claim, holding that the records were "known to [petitioners] during trial and could have been obtained by them through exercise of due diligence." 473 F. 2d at 1344. Petitioners now assert that the records[1] were unavailable be-

[1]The records involved in this Section 2255 motion are apparently the same as the records involved in the direct appeal; petitioners have never asserted that different records are involved.

cause of pre-indictment delay. This is no more than another argument in support of an issue that the federal courts have already resolved against petitioners. Because petitioners are entitled to but a single federal litigation on this point, *Sanders* v. *United States*, 373 U.S. 1, there was no need to hold a hearing.

Petitioners also contend that they were prejudiced by the death, one month before trial, of Norman Reed, an attorney with the Securities and Exchange Commission, who was to be a witness in their behalf. However, petitioners have never indicated the subject of Reed's testimony, what evidence he was expected to give, or how its loss could have hampered their defense at trial. Where, as here, a Section 2255 motion is devoid of any factual basis, but instead consists only of bald legal assertions, a court may deny the motion without a hearing.[2] *Sanders, supra*, 373 U.S. at 19.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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[2]Petitioners' reliance (Pet. 4) on *Montgomery* v. *United States*, 469 F. 2d 148 (C.A. 5), is misplaced. *Montgomery* ruled that conflicting factual allegations in affidavits must be resolved by an evidentiary hearing. However, because petitioners have not alleged any facts concerning the matters to which the deceased witness would have testified, there is no factual controversy in this case requiring resolution.